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No. 86-212 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1986

DANIEL ERWIN DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner claims (Pet. 4-7) that the imposition of consecutive sentences, following his guilty plea to a conspiracy charge and two separate substantive offenses, violated the Double Jeopardy Clause of the Fifth Amendment.

1. Petitioner was indicted by a federal grand jury in the District of Colorado on various drug related offenses (Pet. App. 2a). He entered into a plea agreement whereby he pleaded guilty to one count of unlawful use of a communication facility, in violation of 21 U.S.C. 843(b). In addition, he pleaded guilty to two counts of an amended information. The first count charged him with attempted evasion of income tax, in violation of 26 U.S.C. 7201, and the second count charged him with conspiracy to distribute cocaine, to defraud the Internal Revenue Service by concealing profits from cocaine trafficking, and to prevent the collection of

income tax, in violation of 18 U.S.C. 371 (Pet. App. 2a, 8a-lla).

The district court accepted petitioner's guilty pleas after inquiring at length whether he understood that consecutive sentences could be imposed on each of the counts (Pet. App. 2a-3a). The court then sentenced petitioner to four years' imprisonment and a $10,000 fine on the offense of unlawful use of a communication facility; to four and one half years' imprisonment and a $10,000 fine on the income tax evasion charge; and to five years' imprisonment on the conspiracy count, the sentence to be suspended in favor of a five-year term of probation. All sentences were to run consecutively (Pet. App. 3a). Petitioner appealed from the sentence, and the court of appeals affirmed (Pet. App. la-7a).

2. Petitioner argues that the conspiracy count, together with the prosecutor's statements regarding the evidence on the other counts, amounted to one comprehensive crime into which the other counts merged, since they were either objects of the conspiracy or means by which the conspiracy was committed (Pet. 4-5). As the court of appeals correctly held, however, this argument is without merit.

This Court has long held that it is permissible to impose consecutive sentences for substantive offenses and conspiracies to commit those offenses. *Iannelli* v. *United States*, 420 U.S. 770, 777-778 (1975); *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961). That rule is based on the so-called *Blockburger* test, see *Blockburger* v. *United States*, 284 U.S. 299 (1932), which is the principal device for determining whether different statutes permit cumulative punishment. In *Albernaz* v. *United States*, 450 U.S. 333 (1981), this Court reaffirmed the *Blockburger* test and held that absent a clear expression of congressional intent to the contrary, consecutive sentences under separate statutory provisions are appropriate

where each provision requires proof of at least one fact not required by the other. Thus, the Court in *Albernaz* permitted the imposition of consecutive sentences for violations of 21 U.S.C. 963, charging conspiracy to import marijuana, and 21 U.S.C. 846, charging conspiracy to distribute marijuana. Because there was no contrary expression of legislative intent, and because each offense required proof of at least one element not required by the other, the Court upheld cumulative punishments, even though the proof at trial supporting the two conspiracy charges was identical, see *United States* v. *Rodriguez*, 585 F.2d 1234, 1239 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980).

Following the same analysis, the court below correctly determined that the *Blockburger* test was satisfied here, as each of the three offenses to which petitioner pleaded guilty contains elements distinct from those of the other offenses. The crime of conspiracy requires proof of an agreement to commit an illegal act, an element not present in either of the substantive offenses. Likewise, the use of a telephone to facilitate a drug-related felony contains entirely different elements from the offense of tax evasion, so the substantive crimes are also distinct. Pet. App. 5a-6a; see also *United States* v. *Ramos*, 666 F.2d 469, 476 (11th Cir. 1982); *United States* v. *Thomas*, 586 F.2d 123, 131 (9th Cir. 1978); *United States* v. *Rodriguez*, 546 F.2d 302 (9th Cir. 1976).

Petitioner's contention (Pet. 5) that *Albernaz* is inapposite because he did not plead guilty to a Title 21 conspiracy is insubstantial. The holding in *Albernaz* was based on well established principles regarding double jeopardy law and cumulative punishments; the analysis used in that case is certainly not limited to the particular offenses at issue there. See Pet. App. 4a-5a.

Petitioner also claims (Pet. 6) that without a clear indication of legislative intent to permit cumulative punishments for the specific offenses involved, it must be presumed that

Congress did not authorize multiple punishments. In fact, however, *Albernaz* holds that the *Blockburger* test is to be controlling unless there is a clear indication of contrary legislative intent. See 450 U.S. at 340. Petitioner points to no such indication of contrary congressional intent in this case.

Finally, citing *United States* v. *Sutton*, 642 F.2d 1001, 1040 (6th Cir. 1980) (en banc), cert. denied, 453 U.S. 912 (1981), petitioner claims (Pet. 6-7) that there is a conflict among the circuits on this issue. In *Sutton*, the court held that because the same evidence at trial supported both the RICO substantive and conspiracy convictions, the convictions merged for purposes of sentencing. As the court of appeals in this case as well as other cases have pointed out, however, the *Sutton* court overlooked the fact that the *Blockburger* test focuses not on the evidence adduced at trial, but on the elements of the crimes charged. Pet. App. 6a-7a; *United States* v. *Watchmaker*, 761 F.2d 1459, 1477 (11th Cir. 1985), cert. denied, No. 85-547 (Jan. 27, 1986); *United States* v. *Marrone*, 746 F.2d 957, 959 (3d Cir. 1984). The *Sutton* case is alone in its interpretation of the RICO statute; the other courts that have considered the issue have uniformly concluded that RICO conspiracy and the substantive offense may be consecutively punished. *United States* v. *Watchmaker, supra*; *United States* v. *Bagaric*, 706 F.2d 42, 63 n.18 (2d Cir.), cert. denied, 464 U.S. 840 (1983); *United States* v. *Marrone, supra*; *United States* v. *Cagnina*, 697 F.2d 915, 923 (11th Cir.), cert. denied, 464 U.S. 856 (1983); *United States* v. *Rone*, 598 F.2d 564, 570-571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

Because the *Sutton* case was decided before this Court's decision in *Albernaz* and before most of the circuit court decisions that have rejected *Sutton's* analysis of the consecutive sentencing issue, we believe that when it again

squarely confronts the issue, the Sixth Circuit is likely to conclude that its previous analysis of this issue was erroneous, and that consecutive sentences are permissible as long as the elements of the two crimes are different, even if the same proof at trial supported both convictions. In any event, the *Sutton* case is limited to the RICO context. Even the Sixth Circuit does not apply the analysis in *Sutton* to ordinary conspiracies such as the one in this case. See *United States* v. *McCullah*, 745 F.2d 350, 355-356 (6th Cir. 1984).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986

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[1]Petitioner's reliance on the Sixth Circuit's pre-*Albernaz* decision in *United States* v. *Austin*, 529 F.2d 559 (1976), is misplaced. The Sixth Circuit has limited *Austin* to its facts, see *United States* v. *McCullah*, 745 F.2d at 355-356, and it has recognized that the proper analysis of cumulative punishment issues is the analysis set forth by this Court in *Albernaz*, which is contrary to the Sixth Circuit's earlier approaches in both *Sutton* and *Austin*. See *United States* v. *Zackert*, 783 F.2d 677, 678-679 (6th Cir. 1986); *United States* v. *Metzger*, 778 F.2d 1195, 1210 (6th Cir. 1985).